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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. 703

JEWELL M. SCHWARTZ, Administratrix of the Estate of EDMUND J. SCHWARTZ, Deceased,
Petitioner,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
a Corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND APPENDIX.

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INDEX

Petition for Writ of Certiorari 1

Jurisdiction 2

Opinions Below 2

Questions Presented for Review 3

Reasons Relied On for Allowance of Writ 3

The Statutes Involved 6

Statement of the Case 7

Reasons for Granting the Writ 12

I. The Supreme Court of Missouri erroneously held that it might, within the meaning of the concurring opinion in the case of Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68, permit some form of assumption of risk to remain as a defense to the employer carrier. This is in direct contradiction to the holding of the majority opinion and a host of cases since that time 12

II. The right to trial by jury under the Seventh Amendment entitles your petitioner to have submitted to the jury the determination of whether there was negligence which was in whole or in part the cause of her husband's death since in this case there were innumerable facts which pointed to negligent conduct on the part of the employer which produced his death, even though a jury might perhaps have found that his death was caused in part by his own negligence 28

Conclusion 35

Summary of Reasons for Granting the Writ 35

Opinion of the Supreme Court of Missouri, dated January 10, 1955 38

Opinion of the Supreme Court of Missouri, dated February 14, 1955 46

TABLE OF AUTHORITIES

Title 28, U. S. C. § 1257 (3) 2

Federal Employers' Liability Act, Title 45, U. S. C., § 51 et seq. 2, 6, 7

Title 45, U. S. C., § 54 ..... 2, 3

Constitution of the United States, Seventh Amendment 6

Restatement of Torts, § 342 17

Restatement of Torts, § 284 21

TABLE OF CASES CITED

Atlantic Coast Line Railroad Co. vs. Chancey, ... Fla. ....., 76 So. 2d 871 (1954) 19

Atlantic Coast Line Railroad Company vs. Smalls, 216 F. 2d 842 (C. A. 4, 1954) 23

Bailey vs. Central Vermont Ry., Inc., 319 U. S. 350, 63 S. Ct. 1062 (1943) 14, 17, 19

Beattie vs. Elgin, Joliet & Eastern Ry. Co., 217 F. 2d 863 (C. A. 7, 1954) 19

Blair vs. Baltimore & Ohio R. Co., 323 U. S. 600, 65 S. Ct. 545 (1945) 12, 20

Bolan vs. Lehigh Valley R. Co., 167 F. 2d 934 (C. C. A. 2, 1948) 33

Boston & M. R. R. vs. Cabana, 148 F. 2d 150 (C. C. A. 1, 1945) 33

Brown vs. Western Railway of Alabama, 338 U. S. 294, 70 S. Ct. 105 (1949) 19

Chapman vs. Alton R. Co., 117 F. 2d 669 (C. C. A. 7, 1941) 32

Ellis vs. Union Pac. R. Co., 329 U. S. 649, 67 S. Ct. 598 (1947) 18, 28, 30

Grand Trunk Western Ry. Co. vs. Heatlie, 48 F. 2d 759 (C. C. A. 6, 1931) 32

Handy vs. Reading Co., 66 F. Supp. 246 (D. C., E. D. Pa., 1946) 26

BLEED THROUGH POOR COPY

Harsh vs. Illinois Terminal R. Co., 348 U. S. , 75 S. Ct. 362 (1955), reversing 351 Ill. App. 272, 114 N. E. 2d 901 (1953) 12, 34
Henwood vs. Chaney, 156 F. 2d 392 (C. C. A. 8, 1946) 31
Illinois Central Railroad vs. Coussens, 77 So. 2d 818 (Mississippi, Feb., 1955) 23
Johnson vs. United States, 333 U. S. 46, 68 S. Ct. 391 (1948) 35
Kulka vs. Nemirovsky, 314 Pa. 134, 170 Atl. 261 (1934) 18
Lavender vs. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946) 12, 30, 34
McAllister vs. United States, 348 U. S. , 75 S. Ct. 6 (1954) 35
Missouri Pac. R. Co. vs. Aeby, 275 U. S. 426, 48 S. Ct. 177 (1928) 26
Myers vs. Reading Co., 331 U. S. 477, 67 S. Ct. 1334 (1947) 35
Stanczak vs. Pennsylvania R. Co., 174 F. 2d 43 (C. A. 7, 1949) 33
Stanford vs. Pennsylvania R. Co., 171 F. 2d 632 (C. A. 7, 1948) 33
Tennant vs. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 (1944) 28, 30
Thomas vs. Union Railway Company, 216 F. 2d 18 (C. A. 6, 1954) 26
Tiller vs. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444 (1943) 3, 12, 13, 18, 23, 27, 28
Toledo, St. L. & W. R. Co. vs. Allen, 276 U. S. 165, 48 S. Ct. 215 (1928) 26
Waddell vs. Chicago E. I. Ry. Co., 142 F. 2d 309 (C. C. A. 7, 1944) 31
Wetherbee vs. Elgin, Joliet & Eastern Ry. Co., 191 F. 2d 302 (C. A. 7, 1951) 32
Wilkerson vs. McCarthy, 336 U. S. 53, 69 S. Ct. 413 (1949) 12, 30
Williams vs. Atlantic Coast Line R. Co., 190 F. 2d 744 (C. A. 5, 1951) 22
Williams vs. New York Central R. Co., 84 N. E. 2d 399 (1949) 34

IN THE

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KANSAS CITY SOUTHERN RAILWAY COMPANY,
a Corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Jewell M. Schwartz, Administratrix of the Estate of Edmund J. Schwartz, Deceased, by her attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Missouri, entered in this case on January 10, 1955.

JURISDICTION.

The judgment of the Supreme Court of the State of Missouri was entered on January 10, 1955. The jurisdiction of this Court is invoked under Title 28, U. S. C., § 1257 (3).

This action was brought pursuant to Title 45, U. S. C. A., § 51 *et seq.*, same being known as the Federal Employers' Liability Act. The plaintiff's complaint was filed charging the defendant with violating the said statute in that its negligence did produce the death here in question. There is no issue as to the applicability of the act, and the Supreme Court of Missouri decided that this case fell within the provisions of the Federal Employers' Liability Act.

OPINIONS BELOW.

The opinion of the Supreme Court of Missouri is found at ..... Mo. ....., 275 S. W. 2d 236. Following the opinion of said Supreme Court of Missouri, petitioner filed a petition for review or reargument and the Court filed another opinion on February 14, 1955, and the same is to be found at ..... Mo. ....., 275 S. W. 2d 236.

This is a final judgment by the Supreme Court of Missouri in which, notwithstanding the verdict for your petitioner, a judgment was entered for the defendant.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether under the Federal law which governs this cause of action, the Supreme Court of Missouri had a right, contrary to 45 U. S. C. A., § 54, as amended in 1939, to set aside a jury verdict on the ground that the petitioner's decedent had assumed the risks of his employment?

2. Whether the Supreme Court of Missouri was correct in holding that the petitioner had failed to establish her cause of action, notwithstanding the fact that there was evidence from which the jury could have found that the decedent met his death by reason of several acts of negligence which were established by the record, because there was no eye witness to the accident and an inference might have been drawn by the jury which pointed toward non-liability as well as toward liability?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The Supreme Court of Missouri has attempted to give new life to the doctrine of "assumption of risk" and to permit it to act as a defense in complete bar to recovery despite the amendment of 1939 to the Federal Employers' Liability Act which has outlawed "assumption of risk" as a defense. This holding of the Supreme Court of Missouri is in direct contradiction to the holding of this Court in the case of *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943). It relies upon the alleged au-

thority of the concurring opinion in that case by one Justice of this Court.

2. The Supreme Court of Missouri, in an opinion, held that it had the authority to usurp the function of the jury and to weigh the evidence and to draw its own conclusions as to the relationship between the several acts of negligence proven by the petitioner, and the death, notwithstanding the fact that an inference that there was such negligence and that such negligence did produce the death could have been drawn by the jury.

3. This holding is directly contrary to the holdings of this Court; those of the various inferior Courts of Federal jurisdiction; and to the Supreme Court of Missouri itself, which decided the case at bar.

4. This Court has repeatedly held that in cases tried in the State Courts which have concurrent jurisdiction with the Federal Courts, that cases brought under the Federal Employers' Liability Act, are governed by Federal law rather than by State law.

5. In repeated cases brought to this Court where the State Courts have failed to follow the proper Federal authority in the particular case as outlined by the many decisions of this Court, this Court has admonished the State Court and granted certiorari in order to review and grant the proper relief to a party deprived of his right to a trial by jury under the proper Federal law as should have been applied in the State Courts.

6. It is incumbent upon this Court in the present case to grant certiorari, because to fail to do so, is not only to

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sanction the unlawful authority usurped by the Supreme Court of Missouri in the present case, but also to permit a serious, dangerous precedent to stand, whereby other State Courts may each consider itself free to adjudicate and determine various cases under this statute in accordance with local rules and precedents and in violation of and contrary to the established decisions of this Court and of other Federal Courts. This would not only be in derogation of the clear Congressional intent in enacting this particular statute but would also be in direct opposition to the previous holdings of this Court to the contrary.

7. The holdings of the applicable Federal authorities, including those of this Court are, that the reviewing Courts in cases arising under the Federal Employers' Liability Act are not, after finding there was a submissible case, free to weigh the evidence or to search the record for some other theory or to substitute their opinion for that of the jury. In the case at bar the State reviewing Court is guilty of not only weighing the evidence but also of searching the record for an inconsistent theory whereby it could differ with the jury and reverse the case thereby.

8. The foregoing action by the Supreme Court of Missouri has resulted in a direct conflict between the holdings of the Supreme Court of Missouri and of those of the various United States Courts of Appeals and of this Court as well in regard to the following question—Does a reviewing Court in an action under the Federal Employers' Liability Act have the authority, after having determined that a submissible case for the jury was presented by plaintiff, to then, hold such verdict to be con-

trary to the manifest weight of the evidence and to reverse on this ground? Every single Federal authority says no. The Supreme Court of Missouri now alone attempts to hold to the contrary in this case predicated upon Federally created rights.

THE STATUTES INVOLVED.

1. The Federal Employers' Liability Act, 45 U. S. C. A., § 51 *et seq.*, 45 U. S. C. A., § 54, which reads as follows:

> "§ 54. Assumption of risks of employment.
>
> "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

2. The Seventh Amendment to the Constitution of the United States, granting the right to trial by jury, which in its pertinent parts provides:

> "In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

STATEMENT OF THE CASE.

In this case brought under the Federal Employers' Liability Act, 45 U. S. C. A., § 51 *et seq.*, the decedent, Edmund J. Schwartz, was an employee of the defendant, Kansas City Southern Railway Company, a common carrier by railroad engaged in interstate commerce (Tr. 74-77, 79, 80, 105-107). Decedent's work pertained to maintaining the area outside of the tracks within the defendant's right of way in the vicinity of Monett, Missouri. We are most concerned with that area located between Mile Posts 96 and 97, along the defendant's right of way, as it has numerically described the situs of this accident. The decedent was not familiar with the particular area (Tr. 175). He had been employed by the defendant on other occasions to work in other locations.

His work consisted of operating a mowing machine along the right of way so that the high weeds, bushes, sprouts, vines and the like could be removed and thus prevent serious fires or other interference and danger on the defendant's right of way (Tr. 106, 165, 166).

On August 27, 1952, the decedent met his death. He had been working alone (Tr. 107, 108). He had been operating the tractor-mower along the east side of the right of way in a northerly direction in the vicinity of an instrument case within which was the equipment which controlled the interlock protection for this part of the defendant's right of way. This instrument box obtained its power from overhead catenary lines which were strung over the tracks and were suspended from the usual type of tele-

graph pole some fifteen feet above the ground. The telegraph pole was held erect by two guy wires, which had been installed by the defendant *itself* at least a year before the accident (Tr. 83). These guy wires ran down to the ground on the hypotenuse to the east and west of the pole (Tr. 41). They were anchored into a concrete base.

The right of way in question was overgrown with weeds which were four to five feet high and meshed with undergrowth (Tr. 85). The underbrush and growth was such that one could not see the guy wire as it was attached to toggles and bolts set in concrete in the ground (Tr. 37). In fact the weeds were so high that if one sat in the mowing machine the weeds would be two to three feet above his head (Tr. 89). The weeds hid the concrete anchor base, the guy wires and the uneven terrain. It hid the edge of the embankment too (T. 38).

The decedent was found missing late at night. A search revealed that the mowing machine had toppled over the embankment. Its wheels were in the air (Tr. 39). The plaintiff was pinned beneath the mower east of the tracks in the gulley into which it had fallen. The gulley was about five feet deep and wide enough to hold the machine in it (Tr. 37). The gulley was a ditch presumably built for the purpose of draining surface water away from the right of way. Found nearby were a ledger plate, two rivets and a few bolts and taps which were part of a mowing machine (Tr. 87, 88). The decedent had obviously mowed in a northerly direction right up to the guy wire to the east of the pole (Tr. 86, 91).

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To the east of the point where the guy wire was attached to the concrete set into the ground there was not enough room on the top of the embankment for the tractor to have passed around it (Tr. 61). It is obvious that the decedent did not know of the easterly guy wire, where it was attached to the ground, nor where the precipice edge of the embankment began (Tr. 169). *It was admitted by the decedent's superior that he did not warn decedent of the guy wire, tell him of its location, or make any other provision by means of which he could be apprised of its presence, despite the fact that his superior well knew of the threat that one operating such a machine might unsuspectingly strike the guy wire and topple the mowing machine into the ditch* (Tr. 181). Inasmuch as he worked alone, he had no way of learning of this hidden danger *which the defendant itself created.*

There was evidence from which a jury could have found that the decedent while operating this mowing machine had come right up to and in contact with the guy wire and that thereby this accident was caused (Tr. 91). There were tire marks that led directly to the guy wire; the ground as of the time of the accident had been mowed *behind* the decedent within several inches of the wire itself; the physical layout at the top of the embankment and the location of the wire were such that even if the decedent did not come in contact with the wire but was merely attempting to pass around it, his right wheel would necessarily go over the edge of the precipice causing the machine to topple into the gulley below (Tr. 38-42, 93). The jury could have found that all of this area, not only the

guy wire, but also the location of the edge of the embankment and the rough terrain underfoot were hidden by the high weeds and bushes.

There was evidence from which the jury could have found that on other occasions two or more men had been required to perform this work, so that at least one man could move in advance of the machine and discover obstacles and dangers ahead and warn the operator in advance (Tr. 93).

In conformance with local practice, the petitioner presented certain instructions to the jury (Tr. 198-201). Unnecessarily petitioner in one single instruction included in the *conjunctive* all of the facts upon which she relied to establish *all* of the several grounds of negligence asserted against the carrier (Tr. 198-200). These contained the following separate allegations of negligence, *each one* of which was in itself a sufficient basis irrespective of the other, upon which a jury verdict could have been found for petitioner. They were:

> (1) the defendant had installed and attached the concealed guy wire of which the decedent was unaware, and failed to warn the decedent of its presence, though obviously unsuspecting contact with it would very easily topple the machine;
>
> (2) the defendant failed to warn the decedent that there was but a three foot aisle to the edge of the embankment east of the point where the easterly guy wire was attached to the toggles situate in the concrete base in the ground underneath the undergrowth, beyond which there was the gulley into which the machine naturally toppled;

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(3) the defendant failed to provide the decedent with a plot plan or other means of learning of the exact location of the dangerous impediment in his path represented by the guy wire;

(4) the defendant had required the decedent to work over extremely rough, uneven and dangerous ground with a mowing machine which might very easily be toppled over in ordinary operation unless he was warned of the dangerous hidden conditions present;

(5) the job should have had at least two men assigned for its performance, one of whom could have made advance investigation of the terrain or searched for artificial conditions installed by the carrier which could present serious risk of injury to life and limb. The very failure to assign more than one man was in itself a deluding assurance of reasonably flat terrain and no dangerous artificial obstacles underfoot.

The petitioner presented this case under Instruction number two in the conjunctive whereby, without need, she assumed the burden of proving each and every one of these allegations of negligence in order to establish her cause of action. *The jury found for the plaintiff* (Tr. 205). Hence, the jury found that the defendant was guilty of each and every one of these elements of negligence.

A motion for a new trial was refused in the Court below (Tr. 211). On appeal to the Supreme Court of Missouri, judgment for the defendant was entered, the Court predicating its holding upon the pernicious doctrine of "assumption of risk." It had usurped the jury function, reweighed the facts and reached the opposite conclusion. A petition for rehearing was filed and was rejected. This petition for certiorari follows.

The facts are such that, we respectfully submit, under the pertinent law this Court should follow the same action that it did but a few weeks ago in the case of *Harsh* v. *Illinois Terminal R. Co.*, 348 U. S. ....., 75 S. Ct. 362 (1955), in reversing the Supreme Court of Illinois, 351 Ill. App. 272, 114 N. E. 2d 901 (1953), and reverse the action of the Supreme Court of Missouri on the authority of *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 S. Ct. 545 (1945); *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943); and *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949).

REASONS FOR GRANTING THE WRIT.

I. The Supreme Court of Missouri erroneously held that it might, within the meaning of the concurring opinion in the case of Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68, permit some form of assumption of risk to remain as a defense to the employer carrier. This is in direct contradiction to the holding of the majority opinion and a host of cases since that time.

The opinion of the Supreme Court of Missouri reveals its erroneous reasoning instantly. It is predicated exclusively upon its interpretation not of the opinion of the Court in *Tiller* v. *Atlantic Coast Line R. Co., supra,* but rather upon its distortion of the concurring opinion filed in that case by Mr. Justice Frankfurter. The Supreme Court of Missouri said at page 237:

> "* * * The plea of 'assumption of risk' was eliminated *to the extent* that an employer may not escape

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liability where negligence on his part in whole or in part contributed to the injury * * *. Many hazards are encountered by employees in the industrial world that no amount of care or foresight can avoid. Apropos of this, note the following taken from the *Tiller case, supra,* 143 A. L. R. 1. c. 975, 976, where Justice Frankfurter, in his concurring opinion, said: 'Industrial enterprise entails, for all those engaged in it, certain hazards to life and limb which no amount of care on the part of the employer can avoid. In denying recovery to an employee injured as a result of exposure to such a hazard, where the employer has in no sense been negligent or derelict in the duty owed to his employees, courts have often said that the employee "assumed the risk." Here the phrase "assumption of risk" is used simply to convey the idea that the employer was not at fault and therefore not liable' " (Emphasis ours).

Fortunately, for railroad employees engaged in interstate commerce, this excerpt from *that* opinion is not the law. It would limit the extent to which assumption of risk has been withdrawn as a defense in these cases. It is in direct contradiction to the language of the majority opinion which says:

> "* * * We hold that *every* vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment * * *" (Emphasis ours).

It is not true that an employer may operate a job unnecessarily dangerously or that there is some work that has to be done that is extremely dangerous to his employees and that such work may be conducted regardless of the

risks involved to the employees without responsibility on the part of the employer. The employer is under a duty which has been described as continuing and non-delegable. In *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 63 S. Ct. 1062 (1943), the Court said:

> "Sec. 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' The rights which the Act creates are federal rights protected by federal rather than local rules of law (Citations). And those federal rules have been largely fashioned from the common law (citation) except as Congress has written into the Act different standards (Citation). At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain (Citation). That rule is deeply engrained in federal jurisprudence (Citations). As stated by this Court in the Patton case it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes, then, a demand of higher supremacy, and yet, in all cases it is a question of the reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery' (Citation). It is that rule which obtains under the Employers' Liability Act (Citations). That duty of the carrier is a 'continuing one' (citation) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent."

Predicated upon this alleged *limited* elimination of the doctrine of assumption of risk from the law, the Court below, in analyzing the facts and the contentions of the parties,

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contrary to law, relieved the master of its recognized common law duties owed to its employees.

Thus the Court said at page 238:

"In the case before us, Schwartz was employed to mow weeds and brush with his own mowing equipment upon defendant's right of way. The right of way consisted to a great extent of embankments with slopes of various degrees and an uneven terrain. Telephone and telegraph poles with guy wires are common and of general use on railroad right of ways. They were present on the railroad property where Schwartz was to do the mowing. It would certainly have been impossible for the defendant to have removed the guy wires and poles or to have provided a level terrain for Schwartz. *It would also have been impractical to have provided a guide for the purpose of informing Schwartz of the location of the guy wires and poles, or to inform him where, in the opinion of the guide, the slope was too steep for the tractor to be used with safety.* Schwartz was an experienced operator of tractors and in all probability knew as much as any one of the dangers of using tractors on a steep incline. Plaintiff introduced evidence that the weeds and brush were so high and dense as to obstruct the view of the lower part of the guy wire. The upper part of the guy wire and the pole to which it was attached were within view. But, be that as it may, Schwartz was employed for the very purpose of cutting the weeds and brush. Had the defendant cleared the ground before employing Schwartz, there would have been no weeds and brush to cut. Again, who could have made the place safe for such weed cutters? *Further, the plaintiff says the level space below where the guy wire entered the ground was not*

wide enough for a tractor to pass. The level space was not intended to be used for that purpose. After viewing the case from all angles, we fail to see wherein the defendant was negligent or failed in its duty to Schwartz. Mowing weeds on the slopes of railroad embankments with tractor power is somewhat dangerous and cannot be made entirely safe. *It is common knowledge that sometimes tractors do turn over when used on embankments. The operator of the tractor must use his own judgment and avoid the danger.* No amount of care on the part of defendant could have eliminated the danger in this case. * * *

"*Cutting weeds and brush on railroad right of ways* whether by tractor power, or horse-drawn mowing machines, or by scythes in the hands of the employees *is accompanied by dangers of various degrees that cannot be avoided.* A man cutting weeds on a steep embankment with a scythe may strike a wire, rock, or other substance causing him to fall to his injury. So, in this case, *if Schwartz had been warned that there were present on the right of way such obstacles* as telephone and telegraph poles, *guy wires,* uneven terrain, etc., *it would not have conveyed to Schwartz any information which he did not already know.* It is, therefore, our opinion that the evidence in this case was insufficient to sustain a finding of negligence" (Emphasis ours).

Our first reaction is one that responds immediately to the apparent blind naivete of the Court below. It is amazing that it could state such conclusions in the light of simple common law principles of negligence. It is everywhere recognized that even as to a business invitee there is a duty either to make the place safe or at least warn

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him of those dangers, so that he may be apprised of the particular hazard and may then look after himself. This common law principle is codified by Section 342 of the Restatement of Torts. It reads:

> "§ 342. Dangerous Condition Known to Possessor.
>
> "A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon, if, but only if, he * * *
>
> "(b) invites or permits them to enter or remain upon the land, without exercising reasonable care
>
> (i) to make the condition reasonably safe, or
>
> (ii) to warn them of the condition and the risk involved therein."

How much more is this true of an employee to whom there is owed a very definite, marked, and non-delegable duty of providing him with a safe place to work or at least warning him of any dangers.

This duty was described in *Bailey* v. *Central Vermont Ry., Inc., supra*:

> "* * * a duty which becomes 'more imperative' as the risk increases * * *"

In all of these cases, as to business invitees, it has been said there where one comes upon the premises of another and is injured by reason of a condition of which he is not aware, and of which he has not been informed by the owner, that responsibility is imposed upon the owner. Wherever it has been suggested that the business invitee

"assumed the risk" of such dangerous condition, it has been expressly rejected because it is said that the doctrine existed only as between master and servant. Today, in the Federal Employers' Liability Act cases, that doctrine is no longer a defense in any form whatsoever even as between master and servant. *Tiller* v. *Atlantic Coast Line R. Co., supra.*

In *Kulka* v. *Nemirovsky,* 314 Pa. 134, 170 Atl. 261 (1934), the same argument was tendered to the Court and unceremoniously rejected. The Court saying at page 139:

> "Defendant owed to the plaintiff the affirmative duty of keeping his premises reasonably safe for business visitors, such as plaintiff, and of giving warning of any failure to maintain them in that condition (Citations): Plaintiff was entitled to rely on defendant's performance of this duty (Citations). Moreover, as plaintiff was employed by another and not by defendant, the doctrine of assumption of risk did not apply to him (Citations)."

An employer is liable for injury sustained by his employee by reason of any artificial or natural danger on his land with which he is fully familiar and which he knows or ought to know his employee may not discover. In such cases, it is the duty of the employer affirmatively to *warn* his employee of that hazard. That is the underlying rationale of the "close clearance" cases in which liability was imposed upon the master for failure to provide adequate warning of such condition. Indeed, in *Ellis* v. *Union Pac. R. Co.,* 329 U. S. 649, 67 S. Ct. 598 (1947), the railroad was held liable even where it had erected some small signs of warning. The Court held that the jury could have found

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that these were inadequate to bring home the danger to the plaintiff under the circumstances under which he worked. The same was true in the case of *Brown* v. *Western Railway of Alabama*, 338 U. S. 294, 70 S. Ct. 105 (1949), in which liability was imposed because clinkers had fallen from the right of way and over one of which the plaintiff tripped and fell. There, too, perhaps the employee might have observed the condition had he been more careful, but his failure to do so could have amounted to nothing more than contributory negligence. So, in *Bailey* v. *Central Vermont Ry. Inc., supra,* when the plaintiff's decedent fell from a bridge which had no guard rail upon it, it was held that the jury could find that under all of the circumstances there present the defendant had failed to make the place reasonably safe for the decedent or was negligent because it had failed to *warn* him of that particular hazard even though his presence there was unusual and unlikely and but for a fleeting moment, and even though the decedent in the exercise of great care for his own safety might have discovered the danger for himself. To the same effect see *Beattie* v. *Elgin, Joliet & Eastern Ry. Co.*, 217 F. 2d 863 (C. A. 7, 1954).

In *Atlantic Coast Line Railroad Co.* v. *Chancey*, ... Fla. ....., 76 So. 2d 871 (1954), the railroad was held liable because a fellow employee failed to warn the plaintiff of a loose gang plank from a box car the plaintiff had been ordered to check. Such failure to warn was held negligence sufficient to sustain the award. The fellow employee had known of the loose gang plank prior to this accident.

All the difficulty arises from the failure or refusal of Courts below to consider the employer's conduct on its own, without regard to the possible corresponding lack of care on the part of the employee. The Court below paid lip service to this thought. It said at page 237:

> "* * * The plea of 'assumption of risk' was eliminated to the *extent* that an employer may not escape liability where negligence on his part in whole or in part contributed to the injury * * *" (Emphasis ours).

But then as we quoted above on pages 15 and 16, for two pages of fine print the Court measured the railroad's conduct for negligence only by noting all the things the plaintiff could have done for himself to escape the master's malfeasance and nonfeasance. This, it is respectfully suggested, was the bone of error which led to its unjust and unlawful conclusion here.

It becomes the duty of the master to consider all of the circumstances involved in the job that he knows is about to be done and which in fact he has directed his employee to perform. He must consider the nature of the equipment involved, the nature of the land upon which the work is to be done, the natural and the artificial conditions which are present and the risks involved. Compare *Blair* v. *Baltimore & Ohio R. Co., supra.* He is particularly responsible for artificial conditions which he *himself* has created such as the guy wire in this case which, might normally not present a dangerous condition, but which would when placed against the background of this case become a most serious and hazardous impediment in the progress of the mowing machine.

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The defendant had a positive duty in this case to warn the decedent of the presence of that guy wire and exactly where it was attached in the ground so that he might know how much room there was within which he might safely move his machine around it, as it was anchored into the concrete, without subjecting himself to the risk of toppling over the edge of the embankment which was itself hidden by the weeds and underbrush. The defendant was under a duty to warn the decedent of the dangerous, uneven, rocky terrain underfoot which might in itself have toppled the machine. *If there was no duty to keep the top of the embankment level there was at least the duty of warning of its precipitous hidden edge's location.*

Negligence has been defined by Professor Bohlen as "weighing the utility of the conduct against the risk involved" or as is otherwise put "is the game worth the candle." See Section 284 of the Restatement of Torts, which reads:

"§ 284. Negligent Conduct; Act or Failure to Act.

"Negligent conduct may be either:

"(a) an act which the actor as a reasonable man should realize as involving an unreasonable risk of causing an invasion of an interest of another, or

"(b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do."

Considering the very minor burden of warning which was involved in telling the decedent by blueprint or map

or chart or even orally of the exact spot where the guy wire was attached to the ground or the width of the available space beyond the guy wire over which the machine could have been safely moved, the risk involved in not giving this warning was terrible. It necessarily meant that if the decedent unsuspectingly attempted to pass around it, he must surely plunge into the gulley below and meet the very death that followed.

That the decedent might have seen the guy wire above the brush is no telltale as to where it was anchored in the ground below. That he may have even been careless in not seeing it at all could under the law amount to nothing more than contributory negligence. Knowing that the decedent had been directed by it to operate his machine along the line in the direct path of which the defendant knew or should have known this guy wire was anchored, a warning which was not given was necessary.

The reasoning and holding of the Supreme Court of Missouri are in diametric opposition to the holding of the United States Court of Appeals for the Fifth Circuit, where the exact question was there posed. There, too, the employee suffered injury by reason of a danger in the place where he was directed to work, of which he was unaware, and of which the master did not warn him. Said the Court in *Williams* v. *Atlantic Coast Line R. Co.*, 190 F. 2d 744, 748 (C. A. 5, 1951):

> "* * * The employer must make proper tests and inspections to discover dangers in the place where the employees must work, and after ascertaining their existence must take reasonable precautions for the safety

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of the employees. The employee has a right to rely upon the performance of this duty by the employer and to govern his actions accordingly. 35 Amer. Juris., p. 604, Master & Servant, Section 175, p. 612, Master & Servant, Section 184. * * *"

This conflict must be resolved by this Court. We respectfully submit that the United States Court of Appeals for the Fifth Circuit correctly interpreted *Tiller* v. *Atlantic Coast Line R. Co., supra.* The Supreme Court of Missouri was in error.

On February 28, 1955, this Court reversed the Court of Appeals for the Fourth Circuit in *Atlantic Coast Line Railroad Company* v. *Smalls et al.*, 216 F. 2d 842 (C. A. 4, 1954), where that Court had entered judgment for the employer notwithstanding a jury verdict for the employees in a Federal Employers' Liability Act case. There, too, the question was whether the carrier had provided a safe place to work. The employees had been run down at a dark crossing by an auto not connected with the railroad. Attendance at the place of the accident was not compulsory. This Court held it the railroad's duty to light that place, even though the injured employees willingly assembled at this crossing which they knew would be dark and dangerous. They knew it was an unlighted public highway on which they might be innocently run down. How much stronger is our case where our decedent *had* to be where he was, and was injured by a hidden danger of which *he* was unaware!

In the case of *Illinois Central Railroad* v. *Coussens*, 77 So. 2d 818 (Mississippi, Feb., 1955), a repair man working

at the top of a concrete shaft, fixing a bucket, was found at the bottom of the shaft. His accident was unwitnessed. He had been sitting on at platform at the top of the shaft. The danger should have been recognized by him, as well as by the employer. Held: Question of fact for the jury.

This makes the case at bar *a fortiori* since the specific hazard that produced the accident was unknown to the decedent, but the employer was fully aware of the same.

It is particularly significant in this case that the foreman *actually* contemplated and anticipated this very hazard and failed to give any warning. Thus, at page 181, we find this question asked of the plaintiff's superior:

> "Q. You knew that there was a rank undergrowth; that there were lots of sprouts, vines and everything growing in and around that cable and the shelf there and you didn't warn him about it did you?
> "A. I would have if I'd of just—
> "Q. Thought about it?
> "A. Thought about it and looked it over. I hadn't been in the habit of telling them about *those* things so I never told him about *that* one."

and at page 182:

> "Q. Mr. Engle on your part of the right of way you know there is a lot of uneven and rough ground where a tractor would be apt to tip over, isn't that right?
> "A. Yes, there is places if they would—
> "Q. Particularly where the undergrowth is very dense and is very difficult to see—a man can't always tell exactly where he is going when he is mowing can he?
> "A. It would be possible that there would be places where he might not could see, that's right.

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"Q. So it would be much better to have another employee with him so that in the event he did tip over the employee could render help and assistance to him?

"A. I never kept that in mind.

"Q. You didn't think of that?

"A. I never kept that in mind.

"Q. Or to guide him and show him where the uneven ground was when he couldn't see and where the weeds would be up two or three feet over his head—that would be true wouldn't it; that would be a safer way to do that work?

"A. If there was two tractors mowing together you mean?

"Q. Or if a man went along to guide the man who was on the tractor so that he would know he wouldn't get into a dangerous place?

"A. It would be all right.

"Q. You didn't do it in this case?

"A. No, sir."

It becomes clear then that the Court below concluded that since every embankment has an edge employees need not be told where it is located, even though hidden by foliage. The Court held that though the defendant had placed certain dangerous artificial things on the embankment which might interfere with safe passage, that such risks are present along and on top of many embankments and hence there was no negligence involved in not warning of them. The Court reasoned as follows: Telegraph poles, guy wires and other things are to be found on all railroad embankments. True they may be very dangerous. True the employee may not know about them. True he may be injured

thereby. *These, the Court below held, are risks that an employee assumes.* The Court below concluded that the failure of the employee to have ascertained these facts for himself constituted not contributory negligence but assumption of risk in the form of non-liability.

Title 45, U. S. C. A., § 54, was an amendment passed by Congress to the Federal Employers' Liability Act for the express purpose of totally and forever in every form excising the doctrine of assumption of risk as a defense in these cases under the statute.

This decision harks back directly to the days before the amendment of 1939 outlawing this defense. This attempts to revive and give new life to such cases as *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 48 S. Ct. 215 (1928); and *Missouri Pac. R. Co.* v. *Aeby*, 275 U. S. 426, 48 S. Ct. 177 (1928). This must not be permitted. It must be stamped on each time that it rears its head. The Court of Appeals for the Sixth Circuit too, recently in *Thomas* v. *Union Railway Company*, 216 F. 2d 18 (C. A. 6, 1954), found the need to stamp out such an attempt in the district court below.

The true approach is found in an opinion by Judge Wyche in *Handy* v. *Reading Co.*, 66 F. Supp. 246 (D. C. E. D. Pa., 1946), where the Court said at page 252:

> "The fact that the nature of the work which the plaintiff was directed to undertake required labor on both sides of the engine, the narrow, dark space between the engine and the retaining wall, the absence of light therein, the presence of the uncovered and unguarded sump containing scalding water just under the

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lowest stirrup of the ladder to the cab of the engine into which an employee would likely step either in descending or mounting the right side of the cab of the engine at night; the fact that a servant of the defendant placed the engine in such a dangerous and hazardous situation when he could have, without interfering with the ordinary operation of the railroad, placed it on the same track, or upon another track in a safe place; the fact that plaintiff testified that he was unfamiliar with the area of the accident, or the presence of the sump or of the scalding water; the fact that one could not ascertain the presence of scalding water in the ditch or sump at night without touching it; the absence of notice or warning of the scalding water in the ditch or sump; plaintiff's testimony that he looked down toward the ground before descending from the cab and saw nothing unusual; whether the plaintiff used due care under all the circumstances; all of these were facts and circumstances for the jury to consider, and weigh in determining whether the defendant was negligent in furnishing the plaintiff with that particular place in which to perform his work; whether the defendant used reasonable care in furnishing the plaintiff a reasonably safe place in which to work; whether the violation of such duty was the proximate cause of plaintiff's injury; and, whether the plaintiff was guilty of contributory negligence, as alleged, and, if so, to what extent the damages should be diminished under the provisions of the Federal Employers' Liability Act."

Too, too often Courts below today are reviving "assumption of risk" in one form or another.

The burden of this Court is simple. It could reverse and cite only the *Tiller* v. *Atlantic Coast Line R. Co.* case,

supra. We respectfully suggest that a sharp opinion of admonishment and restatement of basic principles would now be timely.

Why on occasion the effort to give this vicious doctrine new life is made we cannot understand. Obviously, it could not here have been done within the clear meaning of the holding of this Court in the *Tiller* v. *Atlantic Coast Line R. Co.* case, *supra.* We doubt that it could even find any support in the "concurring" opinion.

This Court said in *Ellis* v. *Union Pac. R. Co., supra*:

> "Whether those standards (negligence) are satisfied is a federal question, the rights created being federal rights."

We must have uniformity of federally created rights.

II. The right to trial by jury under the Seventh Amendment entitles your petitioner to have submitted to the jury the determination of whether there was negligence which was in whole or in part the cause of her husband's death since in this case there were innumerable facts which pointed to negligent conduct on the part of the employer which produced his death, even though a jury might perhaps have found that his death was caused in part by his own negligence.

This is an action in which the decedent suffered fatal injury. There is, therefore, available to the petitioner, the presumption that the decedent exercised due care for his own safety and that he was performing the job he had been assigned to do when he met his untimely death. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944). While it may well be that it could have

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been argued to the *jury* that the decedent carelessly and through no fault of the defendant whatsoever fell asleep at the wheel or inadvertently twisted the wheel so that the tractor ran off the edge of the embankment into the gulley not because of any defect or dangerous condition in the terrain or because of the artificial condition maintained there by the defendant, but solely because of his own exclusive negligence, there were many, many facts which support at least equally well the conclusion that the accident happened because of the negligence of the defendant. These were tracks which led directly to the wire.[1] There were marks of the rear wheels spinning at a point where the front had to be against the guy wire, indicating that the machine had run against it, and been stopped by the wire, and then fell over into the embankment. Admittedly, here was a very rough and uneven terrain which *per se* may have caused the tractor to topple over into the gulley. There had been no warning given of these dangers; inadequate help had been provided.

It is obviously a pure jury function that is here involved. Inasmuch as this record contains adequate probative facts from which the jury could conclude that the

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[1]At page 91 is the following testimony:

"Q. Did the truck go up to the cable?

"A. Yes, sir, in my estimation it went *to* the cable.

"Q. South of that track did you find any rear wheel tracks?

"A. Well, they were down the hill, like just about where the front wheels would have been *against* the cable.

"Q. Could you describe those rear wheel tracks?

"A. All I can say is they looked like they were slipping and they *touched* there and that is the last I saw" (Emphasis ours).

guy wire or the uneven terrain, the presence of neither of which had been revealed to the decedent by the defendant, were the direct causes of the machine falling into the gulley, this decision could not be taken away from the jury and ruled upon by a Judge. To do so is to deprive the petitioner of his inalienable right to trial by jury. To do so and to permit it to have been done in this case by the Supreme Court of Missouri is to allow it to winnow away the widow's right to "trial by jury." It is to allow this holding to stand in direct contradiction to the holdings of this court in *Lavender* v. *Kurn, supra; Ellis* v. *Union Pac. R. Co., supra; Tennant* v. *Peoria & P. U. Ry. Co., supra; Wilkerson* v. *McCarthy, supra;* and a host of other cases beside these in this Court and in the various Courts of Appeals throughout the United States.

In *Tennant* v. *Peoria & P. U. Ry. Co., supra,* this Court said, at page 412:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. *It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co.* v. *McDade,* 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049,

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34 L. Ed. 235; *Tiller* v. *Atlantic Coast Line R. Co., supra*, 318 U. S. 68, 63 S. Ct. 451, 143 A. L. R. 967; *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable*" (Emphasis ours).

In *Waddell* v. *Chicago E. I. R. Co.*, 142 F. 2d 309 (C. C. A. 7, 1944), the Court said, at page 309:

"Defendant makes a rather convincing argument that plaintiff's injuries were not the result of any negligence on its part. It is an argument, however, which could more appropriately be made to the trier of the facts. Any doubt heretofore existing as to the limited scope of our authority on review has been dispelled by recent decisions of the Supreme Court. *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Tennant* v. *Peoria & Pekin Ry. Co.*, 64 S. Ct. 409. *No good purpose could be served, therefore, in relating or discussing the testimony further than to ascertain if plaintiff's charge of negligence is supported by any substantial evidence when considered in the light most favorable to plaintiff and together with all inferences which may be reasonably drawn therefrom*" (Emphasis ours).

In *Henwood* v. *Chaney*, 156 F. 2d 392 (C. C. A. 8, 1946), the Court said, at page 398:

"The appellant in its brief presents argument relating to *inconsistencies in the testimony of plaintiff's*

witnesses and to weight of evidence and credibility of witnesses. But the jury has passed on these questions and we are bound by its decision. Tennant, Adm'x, v. *Peoria & Pekin Union R. Co.,* 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520" (Emphasis ours).

In *Grand Trunk Western Ry. Co.* v. *Heatlie,* 48 F. 2d 759 (C. C. A. 6, 1931), the Court said, at page 761:

"*The contention that the verdicts are against the weight of the evidence cannot be considered,* as this court can go no further than determine whether there is substantial evidence to support them" (Emphasis ours).

In *Chapman* v. *Alton R. Co.,* 117 F. 2d 669 (C. C. A. 7, 1941), the Court said, at page 672:

"By assignment of error three plaintiff urges reversal on the ground *that the verdict of the jury was against the manifest weight of the evidence.* The duty of this Court under this assignment is limited to ascertaining if there was any substantial evidence supporting the jury's verdict. The credibility of the witnesses, the inferences to be drawn from proven facts, the weight to be accorded the various items of evidence were exclusively for the jury. The rule to be followed is too familiar to warrant extended discussion (Citations)" (Emphasis ours).

In *Wetherbee* v. *Elgin, Joliet & Eastern Ry. Co.,* 191 F. 2d 302 (C. A. 7, 1951), the Court said, at page 308:

"An appellate court may not reweigh the evidence and set aside the verdict because the judges would draw different inferences and conclusions than the jury drew, or because they think that another result

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would be more reasonable. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 88 L. Ed. 520."

In *Stanczak* v. *Pennsylvania R. Co.*, 174 F. 2d 43 (C. A. 7, 1949), the Court said, at page 47:

> "There being evidence from which the jury may reasonably have inferred that Stanczak came to his death by one of the means suggested above and upon which to base a finding that such means involved negligence on the part of appellant under the circumstances shown by the evidence, it is not within the function of this court to go back of the jury's verdict to consider other possible means not involving negligence on the part of appellant. *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444."

In *Stanford* v. *Pennsylvania R. Co.*, 171 F. 2d 632 (C. A. 7, 1948), the Court said, at page 634:

> *"If there was any evidence which, together with all the reasonable inferences that might be drawn therefrom, supports plaintiff's case, the trial judge erred in substituting his conclusions for those of the jury, since the jury is the tribunal to decide that type of issue* (Citations). * * * Otherwise *it would be an invasion of the jury's function for the trial judge to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 653, 67 S. Ct. 598, 91 L. Ed. 572" (Emphasis ours).

See also *Bolan* v. *Lehigh Valley R. Co.*, 167 F. 2d 934 (C. C. A. 2, 1948); *Boston & M. R. R.* v. *Cabana*, 148 F. 2d 150

(C. C. A. 1, 1945), and *Williams* v. *New York Central R. Co.*, 84 N. E. 2d 399 (1949).

Only last week this Court with precision and force emphasized by the brevity of its opinion reversed this exact course of conduct attempted to be followed by the Supreme Court of Illinois in *Harsh* v. *Illinois Terminal R. Co., supra.* This Court there said in all:

> "Judgment reversed. *Lavender* v. *Kurn,* 327 U. S. 645, 66 S. Ct. 740."

Perhaps so short an opinion by this Court loses its intended force and meaning because Judges and lawyers are too busy to go to the lower Court opinion to see just what has been reversed and what proposition of law has been condemned.

There is far more in this case to justify the finding of negligence on the part of the employer here than in *Lavender* v. *Kurn, supra;* much less of speculation and guess work. The amazingly twisted misconception of the facts of *Lavender* v. *Kurn, supra,* as cited and stated by the Supreme Court of Missouri in its opinion in this case in reversing the jury finding, reveals either its lack of understanding of the principle of law so clearly set forth in that case or its unwillingness to abide by the law as stated therein.

The Court below, in rejecting *Lavender* v. *Kurn, supra,* as authority, said:

> "In that case the deceased, a member of a train crew was alleged to have been struck in the back of the head by a mail hook hanging loosely on the out-

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side of a mail car. Haney was struck as the train passed him at the rate of eight to ten miles per hour."

That is the entire comment of the Court as to that case. Seemingly, the Court did not recognize the basic principle of that case as to the character or weight of evidence necessary to meet the burden of proof in the Federal Courts. It failed to realize that in that case too there was no direct proof that the decedent was struck in the head by a mail hook or that the mail hook was hanging loosely. Those were merely inferences which were permissible for the jury to draw from all of the evidence, from the fact that the decedent had a hole in the back of his head which he could have sustained if he was struck by a loose swinging hook on the passing train *had* he been standing on a certain mound nearby. The logic of this Court in that case is most compelling. However, the same rationale makes the instant case one which is *a fortiori*. It is the rule this Court has applied in *Myers* v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334 (1947); *Johnson* v. *United States*, 333 U. S. 46, 68 S. Ct. 391 (1948); and *McAllister* v. *United States*, 348 U. S. ..., 75 S. Ct. 6 (1954).

CONCLUSION.

Summary of Reasons for Granting the Writ.

This case is logically separated into several sections.

In the first section, our argument is in summary that there is a duty to provide an employee with a safe place to work. If there are dangers in the place where the employee is directed to work, there is a duty on the master

to apprise his employee of those hazards or risks so that he may guard or protect himself against them. This is particularly true where the hidden and dangerous condition of the place where the employee is directed to work is one which was directly created by the employer. This was true in this case where a guy wire extended for the purpose of supporting an upright pole alongside the right of way was hidden beneath the undergrowth and would form a naturally dangerous trap to anyone not aware of its presence. Moreover, there was an extremely rough terrain which could in itself have toppled the machine into the gulley. In addition, there was inadequate room around the point where the guy wire was fastened into a concrete base in the ground to the right of the right of way for the machine to have passed. Of these facts too, the employee should have been apprised as he would have no way of knowing of these hazards without direct information. Thirdly, the edge of the embankment itself was hidden by the foliage, growth and high weeds and there was no way for the decedent to have learned of it. There was evidence from which the jury could have found that ordinarily this work is done by more than one man with one man acting as an advance guard to explore the area ahead on foot and then inform the operator of the particular hazard. In each of these respects there was affirmative negligence on the part of the master. *The Court below erroneously held that the decedent assumed the risks of these dangers and should have learned of them himself and that his failure to do so represented non-negligence on the part of the employer.*

In the second section, our argument is in summary that where there was, as here, an evidentiary basis for the jury

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to find the railroad guilty of any one of the causative multiple acts of negligence just enumerated in the section above, that then even in the absence of direct proof of how the accident happened, it was for the jury alone to make such decision. It was error for the Court below to hold that this was a function for the Trial Judge and not the jury to perform. In so holding, your petitioner was deprived of the right to trial by jury under the Seventh Amendment of the Constitution of the United States by the Supreme Court of Missouri.

It is respectfully submitted that the judgment of the Court below should be reversed and judgment entered upon the jury verdict.

Respectfully submitted,

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APPENDIX "A."

No. 44261.

IN THE SUPREME COURT OF MISSOURI.

DIVISION NUMBER TWO.

SEPTEMBER SESSION, 1954.

JEWELL M. SCHWARTZ, Administratrix of the Estate of Edmund J. Schwartz, Deceased, *Respondent*,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, a Corporation, *Appellant*.

APPEAL FROM THE CIRCUIT COURT OF VERNON COUNTY.
HON. O. O. BROWN, JUDGE.

This is a suit filed by plaintiff Jewell M. Schwartz as administratrix of the estate of Edmund J. Schwartz, her husband, deceased, to recover damages for his death. A trial by jury resulted in a verdict and judgment for plaintiff in the sum of $22,500. Defendant appealed.

Plaintiff's cause of action was based on the Federal Employers' Liability Act. Plaintiff's husband lost his life on August 27, 1952, when he was cutting weeds and brush on defendant's right of way in Vernon County, Missouri. The immediate cause of death was that a tractor Schwartz was using in mowing the weeds turned over and trapped him thereunder.

Plaintiff's case was submitted to a jury on failure of the defendant to furnish Schwartz a safe place in which to

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work; failure to warn of the dangerous condition of the ground by reason of the contour of the ground and the guy wires on the right of way; and failure to provide a helper or guide to assist in the work.

The defendant's principal point of defense on this appeal is, as it was at the trial, that Schwartz was not an employee of the defendant, but was an independent contractor. Further, if he was an employee, plaintiff's evidence was insufficient to sustain a finding that defendant failed to furnish a safe place to work.

The evidence showed the following: Schwartz was a farmer living near Richards, Missouri. In 1951, he entered into a contract with the defendant Railway Company to mow weeds or brush on the railroad right of way. The contract provided that Schwartz was to use his own tractor and mowing equipment at a stipulated price per hour. In July, 1952, a similar contract was executed whereby Schwartz agreed to mow weeds and brush on defendant's right of way by use of his own tractor and mowing machines at $3 per hour. In August, the section foreman notified Schwartz that mowing was to begin August 11. Under the contract Schwartz had the right to work any number of hours on any day he chose. Plaintiff testified that on Sunday, August 10, her husband began the work of mowing and put in a few hours' work on that day. On the morning of August 27, 1952, plaintiff took her husband in their automobile to a road crossing south of the Marmaton River, where his equipment was then located, to commence his work for the day. It was understood that plaintiff was to meet her husband at this crossing at 7:00 P. M. Mrs.

Schwartz returned to the crossing and waited some time but her husband failed to show up. Plaintiff became alarmed and notified the section foreman and some of her friends. A search was made and Schwartz was found dead under the tractor which had turned upside down. Witnesses testified that the tractor had turned over near a guy wire which was anchored in the ground. At this point where the tractor turned over, there was an embankment upon which the railroad tracks were located. At the spot where the guy wire was anchored in the ground, there was a level space and on the lower side of the point where the wire entered the ground, it was level for about 3 feet. It is plaintiff's theory that Schwartz drove the tractor onto this level space where it struck the guy wire and then turned over, the 3-foot space not being of sufficient width for the tractor to pass. The slope from the top of the embankment down to the bottom was rather steep. It is also plaintiff's theory that the lower portion of the guy wire was hidden from view by the high weeds and brush. It is plaintiff's contention that the insufficient level space below the guy wire for the tractor to pass the wire itself plus the fact that it (the guy wire) could not be seen rendered the place unsafe for Schwartz; that defendants should have notified Schwartz of the danger or have sent a guide with him for the purpose of pointing out the danger. It was in evidence that a great deal of the space along the embankment was uneven and rough.

The Federal Employers' Liability Act, upon which plaintiff based her claim, eliminated from the law the defense of "contributory negligence." The plea of "assump-

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tion of risk" was eliminated to the extent that an employer may not escape liability where negligence on his part in whole or in part contributed to the injury. *Tiller* v. *Atlantic Coast Line R. Co.*, 143 A. L. R. 967, 318 U. S. 54. However, to establish liability, a plaintiff is required to produce evidence from which negligence may be inferred by a jury. In this case, plaintiff was required to produce evidence from which it could be inferred that the defendant was in some degree negligent in not furnishing plaintiff a safe place in which to work. Many hazards are encountered by employees in the industrial world that no amount of care or foresight can avoid. Apropos of this, note the following taken from the *Tiller case, supra*, 143 A. L. R. l. c. 975, 976, where Justice Frankfurter, in his concurring opinion, said: "Industrial enterprise entails, for all those engaged in it, certain hazards to life and limb which no amount of care on the part of the employer can avoid. In denying recovery to an employee injured as a result of exposure to such a hazard, where the employer has in no sense been negligent or derelict in the duty owed to his employees, courts have often said that the employee 'assumed the risk.' Here the phrase 'assumption of risk' is used simply to convey the idea that the employer was not at fault and therefore not liable."

In the case before us, Schwartz was employed to mow weeds and brush with his own mowing equipment upon defendant's right of way. The right of way consisted to a great extent of embankments with slopes of various degrees and an uneven terrain. Telephone and telegraph poles with guy wires are common and of general use on railroad

right of ways. They were present on the railroad property where Schwartz was to do the mowing. It would certainly have been impossible for the defendant to have removed the guy wires and poles or to have provided a level terrain for Schwartz. It would also have been impractical to have provided a guide for the purpose of informing Schwartz of the location of the guy wires and poles or to inform him where, in the opinion of the guide, the slope was too steep for the tractor to be used with safety. Schwartz was an experienced operator of tractors and in all probability knew as much as anyone of the dangers of using tractors on a steep incline. Plaintiff introduced evidence that the weeds and brush were so high and dense as to obstruct the view of the lower part of the guy wire. The upper part of the guy wire and the pole to which it was attached were within view. But, be that as it may, Schwartz was employed for the very purpose of cutting the weeds and brush. Had the defendant cleared the ground before employing Schwartz, there would have been no weeds and brush to cut. Again, who could have made the place safe for such weed cutters? Further, the plaintiff says the level space below where the guy wire entered the ground was not wide enough for a tractor to pass. The level space was not intended to be used for that purpose. After viewing the case from all angles, we fail to see wherein the defendant was negligent or failed in its duty to Schwartz. Mowing weeds on the slopes of railroad embankments with tractor power is somewhat dangerous and cannot be made entirely safe. It is common knowledge that sometimes tractors do turn over when used on embankments. The operator of the

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tractor must use his own judgment and avoid the danger. No amount of care on the part of defendant could have eliminated the danger in this case. In the case of *Eckenrode* v. *Pennsylvania R. Co.*, 164 F. 2d 996, l. c. 1000, the court at the conclusion of the opinion made the following comments which may well be used in this case: "Any Federal Judge who sees these railroad accident cases come in and go out of the courts must be troubled by the unsatisfactory social results obtained. Some claimants go out with very large verdicts. Others go out with nothing. Yet * * * the disastrous consequences upon the victim or his family are equally heavy. But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist. It does not exist in this case." In that case there was a judgment for the defendant. It was affirmed by the United States Supreme Court. See 335 U. S. 329.

Plaintiff has cited many cases, both state and federal, to support her contention that defendant was negligent in failing to provide her husband a safe place in which to work. We have examined a number of these and by referring to the cases cited it will be found that in each there was evidence of some defect in the appliance or some lack of due care. In *Joice* v. *Missouri-Kansas-Texas R. Co.*, 354 Mo. 439, 189 S. W. 2d 568, Joice was injured when an extra train struck a motorcar. The negligence charged was failure to notify Joice of the whereabouts of the extra train and in furnishing him a defective motorcar for use in assigned

work. In *Curtis* v. *Atchison, T. & S. F. Ry. Co.*, 363 Mo. 779, 253 S. W. 2d 789, the negligence charged was failure to have the lights burning which had been provided to illuminate the yards where Curtis stumbled over an obstacle. In *Holmes* v. *Terminal R. R. Assn. of St. Louis*, 363 Mo. 1178, 257 S. W. 2d 922, Holmes was injured when he slipped on an icy surface trying to pull a heavy baggage truck. The negligence was failure to have the truck properly lubricated, failure to remove the ice, and that the truck was too heavy for one man to move. In *Willis* v. *Atchison, T. & S. F. Ry. Co.*, 352 Mo. 490, 178 S. W. 2d 341, there was a defect in the loading device used in loading and unloading automobiles on and off railroad cars.

In *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, Haney, the deceased, a member of a train crew, was alleged to have been struck in the back of the head by a mail hook hanging loosely on the outside of a mail car. Haney was struck as the train passed him at the rate of 8 to 10 miles per hour. In *Blair* v. *B. & O. R. Co.*, 323 U. S. 600, 89 L. Ed. 490, the plaintiff was injured while unloading heavy steel pipes from a railroad car. Blair had protested that the pipes were too heavy for him to unload and suggested that the railroad car should be moved to the consignee's place of business where proper equipment for unloading such pipes was located. Blair was ordered to unload the pipes. In attempting to perform that task, he was injured. One of the charges of negligence was that the floor of the warehouse was uneven where the unloading took place.

Cutting weeds and brush on railroad right of ways whether by tractor power, or horse-drawn mowing ma-

chines, or by scythes in the hands of the employees is accompanied by dangers of various degrees that cannot be avoided. A man cutting weeds on a steep embankment with a scythe may strike a wire, rock, or other substance causing him to fall to his injury. So, in this case, if Schwartz had been warned that there were present on the right of way such obstacles as telephone and telegraph poles, guy wires, uneven terrain, etc., it would not have conveyed to Schwartz any information which he did not already know. It is, therefore, our opinion that the evidence in this case was insufficient to sustain a finding of negligence.

It follows that the judgment in plaintiff's favor must be and is hereby reversed.

.....

Henry J. Westhues, Commissioner

Per Curiam: The foregoing opinion by Westhues, C., is adopted as the opinion of the court.

Ellison, P. J., and Dew and Anderson, Special Judges, Concur; Leedy, J., not sitting.
Bohling, C., Concurs.
Barrett, C., Concurs.

No. 44261.

IN THE SUPREME COURT OF MISSOURI.

DIVISION NUMBER TWO.

JANUARY SESSION, 1955.

JEWELL M. SCHWARTZ, Administratrix of the Estate of Edmund J. Schwartz, Deceased, *Respondent*,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, a Corporation, *Appellant*.

APPEAL FROM THE CIRCUIT COURT OF VERNON COUNTY.
HON. O. O. BROWN, JUDGE.

On Motion for Rehearing, to Modify Opinion, or to Transfer to Court En Banc.

Per Curiam: Respondent has filed motions for rehearing, or to modify the opinion, or to transfer to the court *en banc*, wherein it is vigorously urged that this court decided the case on an issue that was not in the case.

It is boldly asserted that respondent did not submit the case to a jury on the theory that the defendant failed to furnish a safe place to work. The suggestions in support of the motions begin with the following statement: "The court missed the boat in this case. It got in the wrong boat and took plaintiff for a free ride over the rapids, and splashed water on him; and it was not Holy water." That statement calls for a review of respondent's brief.

Point I of the brief was devoted to the question that the deceased was an employee and not an independent contractor. That suggestion was not decided but for the pur-

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pose of the opinion we took for granted that the relation of employer and employee existed.

Point II reads as follows: "The Plaintiff Made a Submissible Case." Thirty cases were cited under that statement.

Point III reads: "Plaintiff's Instruction No. 2 Is Correct."

> "A. The decedent was engaged in interstate transportation or commerce as a matter of law." Five cases were cited.
>
> "B. If instruction No. 2 was erroneous defendant joined in that error." Ten cases were cited.
>
> "C. The facts which the jury found under instruction No. 2, as a matter of law, amounted to negligence in failing to furnish a reasonably safe place to work." Seven cases were cited.
>
> "D. Defendant had an absolute duty to warn deceased of the hidden dangers and Instruction No. 2 properly submits this ground of recovery." Ten cases or authorities were cited here.

Now, let us look at respondent's argument in the brief. At page 34 thereof, we find the following: "C. The facts which the jury found under Instruction No. 2, as a matter of law, amounted to negligence in failing to Furnish a Reasonably Safe Place to Work." Emphasis was furnished by respondent. The brief continues as follows: "With reference to the ground of recovery that deceased was not furnished a reasonably safe place in which to work, Instruction No. 2 requires a finding: * * *." This is followed by nine

separate statements of facts which respondent insists the jury was required to find.

Respondent concludes his argument with this statement: "It, therefore, appears that the facts and the authorities authorized the submission as given in Instruction No. 2, of defendant's failure to furnish a reasonably safe place to work, including the employment of an unsafe method, or failure to furnish additional help if the mowing machine was to be used."

It is apparent that if this court got in the wrong boat, it was respondent that led the way and took plaintiff over the rapids. We may add that if water was splashed on plaintiff, it was her attorney that did the job. The writer of the opinion is the author of these comments.

The motions for rehearing, or to modify the opinion, or to transfer to the court *en banc* are overruled.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. 703

JEWELL M. SCHWARTZ, Administratrix of the Estate of EDMUND J. SCHWARTZ, Deceased,
Petitioner,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
a Corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX

Petitioner's Statement of the Case 1

I. The Supreme Court of Missouri Did Not Hold That Petitioner Could Not Recover Because of Assumed Risk, but Held That the Evidence Was Insufficient to Support a Finding of Negligence 4

II. The Petitioner Was Not Deprived of Her Right to Trial by Jury under the Seventh Amendment 6

Conclusion 6

Cases Cited

Brady vs. Southern Ry. Co., 320 U. S. 476, 64 S. Ct. 233 6

Eckenrode vs. Pennsylvania R. Co., 164 F. 2d 996, aff'd 335 U. S. 329, 69 S. Ct. 91 5

Moore vs. Chesapeake & O. R. Co., 340 U. S. 573, 71 S. Ct. 428 5

Statute Cited

45 U. S. C. A., Sec. 51, et seq. 4

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

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JEWELL M. SCHWARTZ, Administratrix of the Estate of EDMUND J. SCHWARTZ, Deceased,
Petitioner,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, a Corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PETITIONER'S STATEMENT OF THE CASE.

We are compelled to take issue with some of petitioner's statements because they are not supported by the record evidence.

On page 7 of the petition, petitioner states: "Decedent's work pertained to maintaining the areas outside of

the tracks within the defendant's right of way in the vicinity of Monett, Missouri."

Decedent was not engaged in maintenance work in the true sense of the word, but had entered into a written contract with the defendant to mow its right of way Miles 91 to 107 (Tr. 15). The Supreme Court of Missouri recognized but did not pass upon defendant's independent contractor defense and said (Pet. 39): "The defendant's principal point of defense on this appeal, as it was at the trial, that Schwartz was not an employee of the defendant but was an independent contractor." Further, the mowing to be performed was in the vicinity of Nevada, Missouri, not Monett, Missouri.

At page 8 of the petition petitioner states: "The decedent was found missing late at night. A search revealed that the mowing machine had toppled over the embankment. Its wheels were in the air (Tr. 39). The plaintiff was pinned beneath the mower east of the tracks in the gulley into which it had fallen." Page 39 of the transcript refers to decedent's tractor, and states categorically that all four wheels of the tractor were up in the air, and the decedent was lying face down and the tractor fender was just above his back.

Then petitioner states (Pet. 9): "There was evidence from which a jury could have found that the decedent while operating this mowing machine had come right up to and in contact with the guy wire and that thereby this accident was caused (Tr. 91)." We submit there is no testimony or even any reference to a mowing machine on the cited page of the transcript. If petitioner now contends

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that the mowing machine caused the fatal injury, then she has abandoned her trial, submission and appeal theory. To illustrate, petitioner's recovery instruction refers specifically to a tractor and says (Tr. 200): "* * * said tractor was caused to and did turn over on and kill deceased * * *."

Nor does petitioner's recovery instruction (Tr. 198, 199, 200) submit or require a jury finding that either the tractor or mowing machine struck the guy wire. The instruction requires this finding (Tr. 200): "* * * said tractor was caused to and did turn over on and kill deceased, while the same was being operated near said guy wire * * *." So again petitioner has shifted her trial theory. Striking a guy wire while operating a tractor is entirely different from operating a tractor in the vicinity of a guy wire. Petitioner is bound by the theory of submission and cannot now disclaim or change it.

Then again (Pet. 10) petitioner states: "There was evidence from which the jury could have found that on other occasions two or more men had been required to perform this work, so that at least one man could move in advance of the machine and discover obstacles and dangers ahead and warn the operator in advance (Tr. 93)."

A reading of pages 92 and 93 conclusively demonstrates that the witness did not testify that he had prior to the accident in question seen a man moving in advance of a tractor with mowing equipment attached mowing the defendant's right of way. The witness testified the year before the accident he saw two parties mowing the right of way with two Fordson tractors (Tr. 92).

The witness' testimony (Tr. 93) that he saw on many occasions two persons mowing the right of way together is of no probative value because there is no showing whether the mowing was being done mechanically or manually. If the work was being done mechanically it is not proper to infer from this evidence that one man moved in advance of the tractor with attached mowing equipment to discover obstacles and dangers and warn the operator in advance.

If the witness meant he saw two men mowing the right of way manually on many occasions, it is immaterial to any of the issues involved. The evidence on this point is too vague and indefinite to be of any probative value. Further it is undisputed that decedent Schwartz was the owner of the tractor and attached mowing equipment.

I.

The Supreme Court of Missouri Did Not Hold That Petitioner Could Not Recover Because of Assumed Risk, but Held That the Evidence Was Insufficient to Support a Finding of Negligence.

Respondent recognizes that assumption of the risk is not a defense under the Federal Employer's Liability Act, consequently did not plead or urge it.

Respondent did urge that there was not any evidence upon which the jury could have found negligence on the part of respondent which contributed in whole or in part to Schwartz' death. 45 U. S. C. A., Sec. 51, *et seq.*

We submit that the decision of the Missouri Supreme Court does not attempt to breathe life into the dead doctrine of assumption of risk, but clearly recognizes its decease

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and final judicial interment, nor did the Court hold a judicial post mortem over this dead doctrine.

The Court's opinion merely holds that Schwartz owned the tractor and attached mowing equipment, he was an experienced tractor operator, that the whole physical set up was open and obvious, that a warning was not necessary, in short under all of the evidence there was insufficient evidence to sustain a finding of negligence, which holding is not contrary to or in conflict with any controlling decision of this Court.

The Missouri Supreme Court bases its opinion upon and follows the doctrine announced in *Eckenrode* v. *Pennsylvania R. Co.*, 164 F 2d 996, which was affirmed by this Court in 335 U. S. 329, 69 S. Ct. 91, 92, wherein this Court said:

> "There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed in whole or in part, to Eckenrode's death? Upon consideration of the record, the court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to petitioner which can sustain a recovery for her."

In *Moore* v. *Chesapeake & O. R. Co.*, 340 U. S. 573, 71 S. Ct. 428, this Court reiterated the rule that to recover under the Federal Employer's Liability Act it is incumbent upon the plaintiff to prove negligence of the defendant which proximately caused the fatal accident. The Court held that the evidence was not sufficient and affirmed the trial court in granting judgment *non obstante veredicto.*

In *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 233, 234, this Court said:

> "The weight of the evidence under the Federal Employer's Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. * * *
>
> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

II.

The Petitioner Was Not Deprived of Her Right to Trial by Jury under the Seventh Amendment.

What we have said and the authorities cited under point I is a full and complete answer to petitioner's contention of her deprivation of her right to trial by jury under the Seventh Amendment.

CONCLUSION.

It is respectfully submitted that the petition for the issuance of a writ of certiorari should be denied.

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